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Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE

There are over 90,000 local governments in the United States.[1] All would be impacted if this Court now interpreted the Constitution to mandate legislative districting based on the number of eligible voters instead of total population, the settled standard this Court has upheld for decades.

New York City is the largest municipal government in the nation.[2] The City is home to nearly 8.5 million residents, more residents than the total population of all but the ten most populous states.[3] Among those residents are millions of individuals integral to the City's economic, social, and civic life who are ineligible to vote.[4] Because of its size and history, New York City has a particularly vital interest in affirming that it is constitutional for local governments to

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[1] Carma Hogue, *Government Organization Summary Report: 2012*, U.S. Census Bureau (Sept. 26, 2013), http://www2.census.gov/govs/cog/g12_org.pdf.

[2] *Current Population Estimates*, N.Y.C. Dep't of Planning, http://www.nyc.gov/html/dcp/html/census/popcur.shtml (last visited Sept. 25, 2015).

[3] *Id.*; *Population Facts*, N.Y.C. Dep't of Planning, http://www.nyc.gov/html/dcp/html/census/pop_facts.shtml (last visited Sept. 25, 2015).

[4] *Id.*

equalize political representation by apportioning voting districts based on equal numbers of total residents.

New York City's most valuable asset is the extraordinary diversity of its residents, including many non-citizen residents and large numbers of children. To reflect that diversity and the importance of all of its residents, and guided by this Court's equal-protection precedents, New York City has for decades used total population as the basis for apportionment in its local legislative body, the Council of the City of New York (the "City Council").[5] Under this longstanding system of apportionment, New York City is divided into 51 districts containing roughly equal numbers of residents, and each district is represented by a single, elected City Council member. Many other local governments use a single-member district system as well.

New York City urges this Court to reaffirm the constitutionality of apportionment by total population, which ensures that the voices of all residents, not just eligible voters, are represented in the democratic process. This commitment to inclusiveness and fair representation is central to the City's identity and critical to its success.

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[5] *See* N.Y.C. Districting Comm'n, *Submission under Section 5 of the Voting Rights Act for Preclearance of 1991 Redistricting Plan for New York City Council* (Jun. 17, 1991), at 11.

New York City today is a global center of trade, investment, and culture. The City fuels both the State and national economy. New York City's local democracy additionally serves as a laboratory for public policy innovation and is at the forefront of efforts to develop novel solutions to our county's most pressing challenges. The continued ability of New York City to make these contributions to the State and country at large is contingent on an apportionment scheme that incorporates the voices of all residents.

Requiring states and local governments to draw districts based on voting population, as appellants ask this Court to do, would result in serious harm, both in New York City and in municipalities across the country. Compared to other local governments, this harm would be amplified in New York City because of its extremely large population, its particular geography, and the wide-ranging diversity of its residents. New York City's population is greater than that of forty out of fifty states, yet its residents live within a much more confined geographical area.[6] Apportionment by voting population would create dramatic shifts in district boundaries and extreme population inequalities across districts that would leave large groups of residents unrepresented and unaccounted

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[6] *Population Facts*, N.Y.C. Dep't of Planning, http://www.nyc.gov/html/dcp/html/census/pop_facts.shtml (last visited Sept. 25, 2015).

for in New York City government. This is largely because non-citizen immigrants, children, and disenfranchised incarcerated residents and parolees tend to be concentrated in specific neighborhoods.[7] These shifts in representation would undermine the health of New York City's democracy and cripple its ability to adequately respond to the needs of its many residents. This Court's prior rule under *Reynolds v. Sims*, 377 U.S. 533 (1964), establishing total population as a constitutional basis for legislative apportionment should remain in place.

SUMMARY OF THE ARGUMENT

Like most other states and local governments, New York City has for decades used total population to apportion voting districts. The established, nationwide use of total population as the relevant measure is no accident. It stems directly from this Court's guidance in *Reynolds* and following decisions—all repeatedly confirming the constitutionality of total population as the standard for districting purposes. Use of total population is not only blessed by this Court's precedent; it also conforms with fundamental tenets of representational democracy by confirming that all residents are entitled to equal representation, a

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[7] Analysis of 2009-2013 American Community Survey data by the Population Division, N.Y.C. Dep't of City Planning.

principle of particular importance given the nation's historic commitment to diversity, inclusion, and robust civic involvement and debate.

Apportionment by total population reflects and supports our fundamental constitutional commitment to equality. Based on its experience, New York City believes that apportionment by total population is most faithful to constitutional standards. At a minimum, use of total population should be upheld as constitutionally permissible. Switching constitutional course and now mandating an inflexible alternative "total voting population" standard, as appellants urge, would harm the mission and function of local governments. The impact on New York City, the nation's largest municipal government, illustrates why this Court should not overrule settled constitutional precedent and compel the over 90,000 local governments nationwide[8] to embark on a novel constitutional experiment with vast political and practical consequences.

As this brief explains, in New York City, the use of total population to equalize City Council voting districts accords with the City's pragmatic mission to provide services to all of its residents, including non-citizen immigrants, children, and

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[8] Carma Hogue, *Government Organization Summary Report: 2012*, U.S. Census Bureau (Sept. 26, 2013), http://www2.census.gov/govs/cog/g12_org.pdf.

disenfranchised prisoners and parolees, all of whom are ineligible to vote but form an integral part of their communities. The "total voting population" measure fails to capture the reality that local governments confront: families and neighborhoods are the building blocks of our cities and towns, and the stability and success of all residents, regardless of their eligibility to vote, strengthens the community as a whole.

Counting every resident for districting purposes aligns with both legal realities and good policy. The City is not only required by law to provide key services for everyone, but also uses these services to encourage the social and economic contributions of immigrants, educate future generations of citizens, and support the communities most affected by mass incarceration. New York City (like other local governments) should not be now barred from using total population as its apportionment base to accomplish those goals and to ensure that all residents are represented in the City Council. This method of apportionment is protected by this Court's longstanding precedent recognizing the constitutionality of the use of total population as the measure for drawing voting districts. It is also a clear, proven, and workable rule for local governments to follow, unlike the new and untested "total voting population" standard proposed by appellants here.

ARGUMENT

This Court has long recognized that "the apportionment task, dealing as it must with fundamental choices about the nature of representation, is primarily a political and legislative process." *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) (inner citations and quotation marks omitted).

Along with most other states and localities in the nation, New York City has for decades drawn districts based on total population, relying on *Reynolds* which settled that apportionment by total population comports with the equal protection guarantee of "one person, one vote." Apportionment by total population accords with principles of equal protection, because it ensures that each elected official is responsible to an equal number of residents. It also equalizes the people's ability to "make their wishes known" to their elected representatives, *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137, *reh'g denied*, 365 U.S. 875 (1961), by preventing population disparities across districts that would cause residents of more populous districts to suffer severely diminished access to their elected representatives and, as a result, vital public goods and services, *Garza v. County of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990); *see also Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (noting that the principle of "[e]qual representation for equal

numbers of people" is also designed to prevent "diminution of access to elected representatives").

This Court should affirm the constitutionality of this longstanding practice of drawing districts based on total population. Apportionment by total population is necessary to ensure that the government will be responsive to the needs of all its residents—including those ineligible to vote—and provides greater opportunities for residents to influence the governmental decisions that have the greatest effects on their daily lives.

I. Relying on a Political Model That Equalizes Representation of Residents Is Critical to New York City's Mission to Serve and Protect Its Residents, Families, and Neighborhoods.

Counting all residents for the purposes of apportionment, regardless of their eligibility to vote, should remain, at minimum, a constitutionally permissible option for localities. Use of total population is especially appropriate on the municipal level because cities provide many key governmental services such as "fire prevention, police protection, sanitation, public health, and parks and recreation." *See Nat'l League of Cities v. Usery*, 426 U.S. 833, 851 (1976) (identifying traditional public services furnished by state and local governments), *overruled on other grounds by*

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

By law, many of these services are constitutionally guaranteed to all eligible residents, not just those entitled to vote. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982) (holding that state statute denying free public education to illegal immigrants violated the Equal Protection Clause); *Graham v. Richardson*, 403 U.S. 365 (1971) (holding that state statute requiring either citizenship or fifteen years of residence to be eligible for welfare benefits violated the Equal Protection Clause); *see also* 42 U.S.C. § 1395dd (banning hospitals from denying emergency care based on insurance status or ability to pay, regardless of citizenship status).

But even setting these legal requirements aside, it is simply good policy for cities to provide governmental services to all eligible residents. Providing and expanding services is a way for cities to attract residents and fuel economic growth. The entire community is also better served when the healthcare, safety, and education needs of all of its residents are met. And on a symbolic level, inclusion in the apportionment base serves as recognition that non-voter populations count and share the same status as voters before the government. Exclusion from the apportionment base sends the harmful message that these groups do not matter. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (noting, in an analogous context, that exclusion from marriage status "has the effect

of teaching that gays and lesbians are unequal in important respects").

Also relevant is the fact that most of these residents pay taxes that help fund city services.[9] *In re Griffiths*, 413 U.S. 717, 722 (1973); *Longway v. Jefferson County Bd. of Supervisors*, 83 N.Y.2d 17, 23 (1993). It is critical that residents ineligible to vote are able to make their wishes known to their representatives by petitioning the government without suffering diminished access, because the ability to petition is the primary means by which they may "influence how their tax dollars are spent." *Garza*, 918 F.2d at 775.

This Court's precedent recognizes the constitutionality of apportionment schemes that count all residents as constituents to ensure that local representative bodies are responsive to the diverse needs of all community members. Requiring cities like New York City to ignore the existence of these residents for the purposes of representation and apportionment would effectively wipe millions of individual residents and entire families off the

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[9] In 2012, for example, undocumented immigrants in New York State paid an estimated $1.1 billion in sales, property, and state and local income taxes. Matthew Gardner, Sebastian Johnson, & Meg Wiehe, *Undocumented Immigrants' State & Local Tax Contributions*, The Institute on Taxation & Economic Policy, at 13 (Apr. 2015), http://www.longislandwins.com/downloads/undocumentedtaxes2015.pdf.

map, rendering those residents and their unique needs invisible to our local democracy.

A. The City Has a Compelling Interest in Counting Non-Citizen Immigrants.

This brief describes the City's compelling interest in counting three essential groups of residents for districting purposes. One of those groups is the City's large population of non-citizen immigrants. The City benefits substantially from its large and diverse immigrant population, *see Aliessa v. Novello*, 96 N.Y.2d 418, 431 (2001), and has a corresponding interest in ensuring representation for that population.

Throughout its history, New York City has served as the country's main gateway for immigrants and continues to serve as a major point of entry today. Although New York City accounts for roughly forty-two percent of New York State's total population, it is home to seventy-one percent of the state's foreign-born residents.[10] Over a third of New York City residents are foreign-born, and approximately eighteen percent of all New York City residents—over 1.4 million—are not citizens.[11]

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[10] Analysis of 2009-2013 American Community Survey data by the Population Division, N.Y.C. Dep't of City Planning.

[11] *Id.*

Immigrant residents are vital to New York City's social fabric and its economic prowess. The City owes much of its rich culture and extraordinary diversity to its immigrant residents. Immigrants also help drive the City's economy: in 2011, they made up forty-four percent of the City's workforce and accounted for $210 billion in the City's economic activity.[12] From 2000 to 2011, the ten Census-defined neighborhoods with the highest concentrations of immigrants showed stronger business growth than the rest of the City.[13] One study estimated that $500 billion of the City's local property tax revenue and $188 billion in home equity over the last thirty years are attributable to immigrants.[14] The City is also home to dozens of ethnic enclaves—such as Chinatown and Little Italy—that serve as key tourist attractions and cultural centers.

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[12] *The Role of Immigrants in the New York City Economy*, Office of the New York State Comptroller (Nov. 2013), http://www.osc.state.ny.us/reports/immigration/NYC_Immigration_Rpt_8-2014.pdf.

[13] *Id.*

[14] Americas Society/Council on the Americas, *Immigration and New York City: The Contributions of Foreign-Born Americans to New York's Renaissance, 1975–2013*, http://www.as-coa.org/sites/default/files/NYCImmigrationReport2014.pdf (last visited Sept. 24, 2015).

New York City counts its millions of immigrant residents, regardless of their citizenship status, when compiling population figures for the purpose of apportioning City Council districts. The inclusion of immigrant residents in the City's democracy has led to concrete laws and policies that benefit immigrant communities. For example, the Mayor's Office of Immigrant Affairs (MOIA) is a city-chartered agency dedicated to supporting immigrants' well-being and linking them to governmental services and resources.[15] Additionally, city law requires that all agencies responsible for direct public services make available free translation and interpretation services to people who need them. *See* Mayor's Executive Order No. 120. And in 2014, the City Council passed and Mayor Bill de Blasio signed Local Law No. 35, creating a municipal identification card, known as the "IDNYC," which is available to all residents, regardless of immigration status. This program is aimed at ensuring that all New Yorkers, particularly non-citizens, have equal access to key government services, are able to open checking accounts, and can meaningfully interact with and seek assistance from police officers and other government officials. New York City actively encourages immigrants to seek out the services, benefits, and programs that

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[15] New York City Mayor's Office of Immigrant Affairs, http://www.nyc.gov/html/imm/html/about/about.shtml (last visited Sept. 24, 2015).

they are eligible to receive. *See* Mayor's Executive Order No. 41.

New York City's inclusive system of apportionment reflects its belief that non-citizen residents are constituents of the City's elected officials, rightful consumers of city services, and should be governed by a local democracy that is responsive to the unique needs of immigrants and the communities in which they live. Equal representation of these residents is especially critical in New York City, where certain areas are substantially more likely than others to contain large numbers of immigrant residents, and non-citizen residents in particular. This unequal distribution occurs at both the borough and neighborhood levels. For example, twenty-two percent of residents in the borough of Queens (approximately 496,132 in total) are non-citizens, compared to only eight percent in the borough of Staten Island (approximately 36,476 in total).[16] In fact, eight out of the ten New York City neighborhoods with the highest percentage of non-citizen residents are located in Queens.[17] In the Queens neighborhoods of North Corona and Elmhurst, non-citizen residents account for approximately fifty-three percent and forty-two

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[16] Analysis of 2009-2013 American Community Survey data by the Population Division, N.Y.C. Dep't of City Planning.

[17] *Id.*

percent of the neighborhood populations respectively.[18] By contrast, in no neighborhood in Staten Island do non-citizens comprise more than seventeen percent of residents.[19]

Preventing New York City from counting non-citizen immigrant residents when apportioning City Council districts would disproportionately harm communities like North Corona and Elmhurst. Nearly 63,000 non-citizen residents would be excluded in these two neighborhoods alone, a number roughly the size of the population of Greenville, South Carolina or Santa Cruz, California.[20] These communities would see devastating reductions in their ability to influence critical public policy decisions. As a result, the special needs of these communities would be woefully underrepresented in New York City democracy, despite the tremendous contributions of their residents and the city services their residents consume and are entitled to receive.

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[18] *Id.*

[19] *Id.*

[20] *Id.*

B. The Provision of Public Education to Children is an Investment in the City's Future and Their Interests Must Be Adequately Represented in Local Government.

Similar problems arise from excluding residents under the age of eighteen from legislative district populations. Public education for children is one of the most critical public services provided by local government and represents an investment in the future health of the community and our future citizens and voters. *Plyler*, 457 U.S. at 221 ("[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.").

Education further plays a "pivotal role . . . in sustaining our political and cultural heritage." *Id.*; *see also Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("[As] . pointed out early in our history, . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."); *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893, 905 (2003) ("[A] sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society."). This Court has recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," *Sch. Dist. of Abington Twp. v.*

Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring), and as the primary vehicle for transmitting "the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). Indeed, this concept is reinforced by the scores of New York City public schoolchildren who have grown up to become future government leaders.[21]

Children are the consumers of one of New York City's most vital public goods and an investment in the future success of our democracy. Accordingly, the communities in which they live must receive adequate representation to address their unique needs. This is particularly true at the local level, where critical education policy decisions are made.

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[21] Notable attendees of New York City public schools include U.S. Supreme Court Justices Ruth Bader Ginsberg, Elena Kagan, and Antonin Scalia; former U.S. Attorney General Eric Holder; U.S. Senators Charles Schumer and Bernard Sanders; former U.S. Senator Norman Coleman; former New York City Comptroller John Liu; Hon. Denny Chin of the U.S. Court of Appeals for the Second Circuit; former Chief Justice of New Jersey Supreme Court Deborah Poritz; former Associate Justice of the Appellate Division of the Supreme Court of New York, Second Department, Barry Cozier; N.Y.S. Supreme Court Judge Milton Tingling; and Congresswoman Grace Meng. Many New York City Council Members have also graduated from the New York City public school system, including current Council Members Margaret Chin, Costa Constantinides, Laurie Cumbo, Inez E. Dickens, Rafael L. Espinal, Vanessa L. Gibson, Andy King, Ben Kallos, Karen Koslowitz, Rory Lancman, Alan Maisel, Darlene Mealy, Rosie Mendez, I. Daneek Miller, Mark Treyger, Jimmy Vacca, Jimmy Van Bramer, Jumaane D. Williams, and Ruben Wills.

See Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

And, much like immigration, certain New York City communities are disproportionately affected by those public policy decisions. Approximately twenty-seven percent of residents in the borough of the Bronx are under the age of eighteen, compared to only fifteen percent in the borough of Manhattan.[22] In fact, all five City Council districts with the lowest proportion of children residents are located in Manhattan and are geographically contiguous.[23] Only eight percent of the residents in City Council District 3, which covers the Manhattan neighborhoods of Hell's Kitchen, Chelsea, the West Village and parts of the Upper West Side, are under the age of eighteen.[24]

By contrast, four out of the five districts with the highest proportion of children residents are

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[22] Analysis of 2010 Decennial Census data by the Population Division, N.Y.C. Dep't of City Planning.

[23] *Id.*

[24] *Id.*

located in the Bronx.[25] Nearly a third of the residents in City Council District 15, which covers the central Bronx, including the neighborhoods of Belmont and Fordham, are under the age of eighteen.[26] The same is true of City Council District 44 in Brooklyn, which covers the neighborhoods of Borough Park, Midwood, and Bensonhurst.[27]

Communities like Belmont and Midwood are major consumers of city services and public goods that are vital to the health and future success of New York City. However, the ability of these communities, which are most impacted by and best positioned to influence policy decisions affecting children, would be severely diluted were children to be excluded from City Council district population counts. In Council Districts 15 and 44 alone, nearly 102,000 children would be erased from the population, roughly double the number of students enrolled in the entire public school system of Atlanta, Georgia.[28]

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[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*; *Superintendent's Final Redistricting and Closure Recommendations*, Atlanta Public Schools (May 7, 2012), http://www.atlantapublicschools.us/cms/lib/GA01000924/Centricity/Domain/45/Final%20-%20Version%20Posted%20May%207.pdf.

C. Counting Incarcerated Residents Enables the City to Support Their Successful Reentry and Provide Necessary Resources to Their Home Communities.

New York City also has a vital interest in ensuring the adequate representation of its incarcerated residents and the communities to which they will return after their incarceration terms are completed. In New York State, individuals who have been convicted of a felony cannot vote while incarcerated or on parole. N.Y. Election Law § 5-106. As a result, approximately 122,018 New York State residents are ineligible to vote because of felony convictions, according to recent estimates.[29] Incarcerated residents are also far from evenly distributed throughout the general population, and the devastating effects of mass incarceration have fallen disproportionally upon the shoulders of certain communities, many of which are located in New York City. These communities are both uniquely harmed by the removal of large numbers of residents to prisons scattered throughout the State and are also tasked with the great responsibility of supporting and encouraging the successful reentry of formerly incarcerated individuals upon release. After all, the

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[29] Nicole D. Porter, *Expanding the Vote: Felony Disenfranchisement Reform, 1997-2010*, The Sentencing Project, at 21 (Oct. 2010), http://www.sentencingproject.org/doc/publications/publications/vr_expandingthevotefinaladdendum.pdf.

vast majority of incarcerated persons return to the communities in which they lived prior to incarceration.[30] The successful reentry of these community members depends upon the ability of local governments to adequately respond to the needs of the communities to which they are returning.

If New York City were required to remove disenfranchised parolees and residents who are incarcerated throughout the State from the population counts of their home neighborhoods, the communities most affected by criminal justice policies would experience diminished political power to influence those policies relative to their neighbors in other parts of the City. For example, the Brooklyn neighborhoods of Brownsville and Ocean Hill would likely face reductions in population roughly sixty-six times greater than those faced by the Manhattan neighborhoods of Chelsea and Hell's Kitchen, where residents are far less likely to come into contact with the criminal justice system and, as a result, face

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[30] Patricia Allard and Kirsten D. Levingston, *Accuracy Counts: Incarcerated People & the Census*, The Brennan Center for Justice, at i (2004), http://www.brennancenter.org/sites/default/files/legacy/d/RV4_AccuracyCounts.pdf (last visited Sept. 24, 2015).

disenfranchisement due to incarceration or parole status.[31]

The people of New York State have already recognized that erasing tens of thousands of incarcerated individuals from their home districts distorts our system of democracy and impermissibly dilutes the political power of communities most affected by state and local criminal justice policy decisions. In 2010, New York State enacted legislation, supported by a majority of the State's voters,[32] mandating that incarcerated persons be counted as residents of their home communities, rather than their places of incarceration, for the purpose of legislative apportionment at the state and local levels. *See* N.Y. Corr. Law § 71(8). Then-State Senator Eric Schneiderman, the bill's sponsor, expressed concern that excluding incarcerated individuals from the population counts of their home communities was creating "electoral inequities" and "leading to vote

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[31] U.S. Census Bureau, 2010 Census Public Law File Prisoner Adjusted LATFOR Population.

[32] Quinnipiac University Release Detail, *New York Voters Back Fracking, Despite Concerns, Quinnipiac University Poll Finds; More Women in Government Means Fewer Sex Scandals*, Quinnipiac Univ. (Aug. 11, 2011) (noting that sixty percent of voters say that prison inmates should be counted as residents in their home districts), http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/new-york-state/release-detail?ReleaseID=1635.

dilution for urban communities of color across the state," largely due to the fact that over seventy-five percent of the people in New York State prisons are people of color and over seventy percent are from urban communities. *See* Sponsor's Memo, *reprinted in* Bill Jacket for Ch. 57 (2010). Thus, as New York State's elected representatives have already recognized, apportionment using a total population count that includes disenfranchised parolees and incarcerated residents is vital to New York City's ability to most effectively serve the needs of some of its most vulnerable communities.

II. This Court Should Adhere to Its Longstanding Precedent Given the Extensive Reliance on *Reynolds* by New York City and Other Local Governments.

In addition to its flaws as a matter of law and policy, adoption of a new constitutional standard would be deeply disruptive for many states and local governments. Such a change would require governmental bodies across the country to jettison their long-used systems of apportionment, which have been shown to be workable, fair, and effective, in favor of a new and unproven approach. The total population rule articulated in *Reynolds* has been the law for more than 50 years, and this Court should not disturb it. Principles of *stare decisis* apply with special force here, because states and local governments have structured their districting practices in extensive reliance on this Court's

precedent. *Bush v. Vera*, 517 U.S. 952, 985-86 (1996) (plurality op.); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202-03 (1991). Even in constitutional cases, this Court has always required "special justification" for overruling settled precedent. *See, e.g., United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996).

The reliance interests here run broadly and deeply. and those interests are significant because use of total population has allowed cities like New York to refine their apportionment practices over time to ensure inclusive representation for all residents. For example, guided by *Reynolds* and following decisions, New York has overhauled its redistricting practices on two major occasions to comport with this Court's holdings. On the same day that *Reynolds* was decided, this Court struck down the apportionment formulas of New York State, holding that they applied a form of geographical discrimination that violated the equal protection guarantee of "one person, one vote." *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964). So, the State re-examined its apportionment scheme, and, in 1969, the people of New York voted to amend the constitution to include "aliens" in the apportionment base and adopt apportionment formulas based on total population. N.Y. Const. art. III, § 5-a; *see also* 1964 Report of the Citizens' Committee on Reapportionment (noting the governor's announcement to revise the state's apportionment plan as expeditiously as possible in

response to the *WMCA, Inc. v. Lomenzo* decision); 1968 Senate Debate Transcripts, p. 1923-24 (noting the cost-effective and practical benefits of using total population figures for apportionment).

More than two decades later, New York City overhauled its districting procedures when this Court struck down its practice of applying "one vote" to each borough for electing some of the representatives of the Board of Estimate—the former governing entity responsible for budget and land-use decisions in the City. *Bd. of Estimate v. Morris*, 489 U.S. 688 (1989). In response to this Court's decision and after a voter referendum, New York City revised its Charter, abolished the Board of Estimate, and restructured the shape of City government by redistributing the Board's power primarily to the City Council and Mayor.[33]

Overturning this Court's longstanding precedent would force New York City to amend its Charter and the State to amend its constitution to restructure districting practices yet again. Moreover, in New York City, the decision to use total population warrants further deference by this Court because it was based on the people's vote. *See*

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[33] Alan Finder, *The 1989 Elections: Overhaul of New York City Charter Is Approved, Polls Show*, N.Y. Times (Nov. 8, 1989), *available at* http://www.nytimes.com/1989/11/08/nyregion/1989-elections-charter-overhaul-new-york-city-charter-approved-polls-show.html.

Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1637 (2014) (reaffirming the value of democratic decision-making based on the people's vote).

New York City has also repeatedly relied on the United States Department of Justice's approval of the City's plans for City Council districting and other voting changes, including preclearance of the New York City Charter provisions that require apportionment by total population. In 1971, three of the City's five boroughs were declared covered jurisdictions under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973b, and remained covered jurisdictions until this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). *See* 36 Fed. Reg. 5809 (Mar. 27, 1971). Under Section 5, the City was required to obtain pre-clearance from the federal government before implementing changes affecting voting in any of its three covered boroughs.

Over four decades, the Department of Justice approved more than 2,000 proposed voting procedures,[34] including preclearance in 1989 of the New York City Charter provisions that articulate

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[34] *See Voting Rights Act: Evidence of Continued Need: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1840 (2006) (Appendix to the statement of Wade Henderson, report of RenewTheVRA.org, "Voting Rights in New York, 1982-2006," at 4).

the procedures and schedules for preparing City Council districting plans.[35] These Charter provisions require roughly equal numbers of total residents per district, with total population deviations of less than ten percent across all districts. *See* N.Y.C. Charter § 52(1)(a). The provisions further require districting plans to be established in a manner that ensures "the fair and effective representation" of "racial and language minority groups" and "keep[s] intact neighborhoods and communities with established ties of common interest and association, whether historical, racial, economic, ethnic, religious, or other." *See* N.Y.C. Charter § 52(1)(b) and (c). New York City's experience confirms that the total population standard works and advances the interests of inclusion and diversity and representation for all residents and neighborhoods.

Given the critical values at stake, other cities include similar criteria in their charters and voting

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[35] *See* N.Y.C. Districting Comm'n, *Submission for Preclearance of the Final Districting Plan for the Council of the City of New York* (Mar. 22, 2013), at 7-9.

laws.[36] Because considerations such as ensuring the representation of minorities and keeping neighborhoods intact are naturally related to people, not voters, New York City and other localities would be unable to fulfill these important mandates if they were required to draw districts based on voting population.

Moreover, as a practical matter, use of total population is the only workable method of districting for city elective positions such as City Council positions, especially given the relatively small size of the districts at issue. As other amici have discussed, the current data on citizenship numbers, which comes from the American Community Survey, is not appropriate for drawing district lines because it is only based on 2.5 percent of American households.[37] This Court should therefore adhere to its prior precedent and continue

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[36] *See, e.g.*, Chi. Mun. Code § 2-8-300 (allowing district lines to respect "established communities of interest"); San Diego Charter § 5.1 (directing the redistricting commission to "preserve identifiable communities of interest"); S.F. Charter § 13.110(d) (allowing slight population variations "to prevent dividing or diluting the voting power of minorities and/or to keep recognized neighborhoods intact"); Wichita Charter Ordinance No. 173 (requiring district lines to "maintain, as much as possible, the integrity of broadly cohesive areas of interest").

[37] Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 Cardozo L. Rev. 755, 757 (2011).

to allow the use of Census figures related to total population in the apportionment task.

One final point bears mention. While appellants and amici dispute the burdens of reversing decades of precedent, at least one factor is undisputed. The constitutional regime that appellants seek to install is untested. The vast majority of local governments throughout the nation have no experience with districting based on "total voting population." While cities have managed to sustain thriving, diverse, and growing populations by ensuring that all residents are represented in their legislative bodies, the feasibility, risks, and repercussions of compelling cities to abandon decades of practice are unknown. Overturning the total population benchmark would compel almost every local government in the nation to embark on a political experiment of vast dimensions at fundamental odds with the longstanding and reasonable goal of protecting and investing in all residents.

By contrast, decades of experience have demonstrated that apportionment by total population is an effective, practical, and fair method of drawing voting districts. This carefully considered system is a critical element of New York City's commitment to treating its residents equally and ensuring that all residents have access to a local democracy that is fully responsive to their needs. Accordingly, New York City joins localities and states across the country in urging the

Supreme Court to affirm this longstanding and proven system of apportionment.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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